Supreme Court, U.S.
FILED
JUL 9 1993
OFFICE OF THE CLERK

No. 92-1814

In The

Supreme Court of the United States

October Term, 1992

DANNY LEE HILL,

Petitioner,

vs.

PITT-OHIO EXPRESS, INC., a Pennsylvania Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court's directed verdict was clearly wrong when there was absolutely no evidence presented to show that non-members of a protected class were treated less severely than Plaintiff for the same or similar conduct.

The questions presented by the Petitioner for review by the Court on writ of certiorari are inappropriate under the criterion outlined in Rule 10 of the Supreme Court Rules. All of the Petitioner's questions presented hinge around the sufficiency of the evidence presented at trial and whether said evidence was sufficient to withstand a directed verdict.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Procedure.

The Plaintiff filed this action on October 9, 1990 in the Kanawha County Circuit Court in Charleston, West Virginia. The complaint alleged age and handicap discrimination in violation of West Virginia Code § 5-11-9, 29 U.S.C. § 621 and 29 U.S.C. § 701. The Defendant then removed the action to the Federal District Court in the Southern District of West Virginia (hereinafter the "court") pursuant to 28 U.S.C. § 1441(b).

This action originally included Ron Uriah as a Defendant, however, the court ruled on Defendant's motion for summary judgment that as a matter of law Ron Uriah should not be a party to the action since he had not been named as a party in Plaintiff's original complaint to the West Virginia Human Rights Commission. However, the court denied a summary judgment motion pertaining to the Defendant, Pitt-Ohio Express, Inc.

This matter proceeded to trial on November 7, 1991 (a first trial ended in a mistrial). At the conclusion of the Plaintiff's case, the Defendant made two motions for directed verdict. In the first motion, the Defendant argued that Plaintiff had failed to introduce any evidence that he met the definition of "handicapped" under West Virginia Code § 5-11-9. The court ultimately denied this motion.

In the Defendant's second motion for a directed verdict, the Defendant argued that the Plaintiff failed to meet its burden of proof in that he failed to introduce any evidence to the effect that the Plaintiff would not have been discharged but for his age. The court deferred ruling on this motion and the Defendant renewed its motion for a directed verdict at the end of all the evidence. The court further deferred ruling on the motion until after the jury returned with the verdict. The jury returned a verdict for the Plaintiff on November 8, 1991. However, the court thereafter granted the Defendant's remaining motion for directed verdict and issued a final judgment order in Defendant's favor dated December 26, 1991. The Plaintiff appealed this final judgment order to the Fourth Circuit Court of Appeals which affirmed the lower court's ruling by order entered August 7, 1992. It is from this decision that the Plaintiff (Petitioner) brings on its petition for writ of certiorari.

B. Statement of Facts

The Defendant, Pitt-Ohio Express, Inc. (Respondent), is a Pennsylvania Corporation doing business in the State of West

Virginia. The Plaintiff (Petitioner), Danny Lee Hill, was employed by the Defendant in 1986 as a truck driver. At the time that the Plaintiff was hired he was 40 years old and already a member of a protected class. On July 3, 1991, the Plaintiff had a heart attack and was away from work for approximately five (5) weeks. Upon the Plaintiff's return to work, he was assigned a City of Charleston delivery route.

On October 18, 1989, the Plaintiff had finished his city route a little early and was asked to make a special trip to Huntington. On October 27, 1989, the Plaintiff was terminated from his position with the Defendant by Fred Terwillinger, the Defendant's terminal manager. This termination was due to a driver's violation report which was a result of observations by Sherry Newkirk, an employee of Safety Service, Inc. The report described observations made by Sherry Newkirk of the Plaintiff traveling at 73 miles per hour in a 65 mile per hour zone under conditions of light rain and moderate traffic. Mrs. Newkirk also observed that the Plaintiff followed traffic at a distance of 20 feet for approximately three miles before passing and did not use his left turn signal upon changing lanes. These observations occurred during Plaintiff's October 18, 1989 trip to Huntington, West Virginia.

The Plaintiff himself acknowledged that if someone were operating a vehicle in the manner as described in the Driver's Violation Report that it would constitute operation of the vehicle in a dangerous manner. The Plaintiff also acknowledged that he did not file a grievance with the company concerning its decision to terminate him nor did he appeal the decision to the company.

Prior to this incident, the Plaintiff was involved in one minor accident while employed with the Defendant and had not received any speeding tickets.

In an attempt to establish his *prima facie* case of employment discrimination, the Plaintiff introduced at trial the testimony of four Pitt-Ohio employees which were evidently presented in an attempt to show a disparity of treatment accorded to non-members of the protected class and contrasted to the treatment of the Plaintiff. The first witness presented by the Plaintiff was Richard Wayne Norman. Mr. Norman was employed by the Defendants for almost five (5) years as a truck driver. Mr. Norman testified that he received one speeding ticket during his tenure with the Defendant. Mr. Norman is himself a member of the protected class since he was 54 years old at the time of trial. Mr. Norman paid the speeding ticket and did not inform the company at the time. Mr. Norman testified he had two or three accidents while employed by the Defendant. He reported this accident to the terminal manager, Fred Terwilliger. Mr. Norman received warning letters concerning the accidents. He received a day off for one accident in which he backed into a building. Mr. Norman testified that he had never been caught or observed in reckless driving. Mr. Norman did not testify as to what policies were in effect at the time of these accidents or speeding tickets. He also did not testify as to the precise dates of the accidents.

A second witness introduced by the Plaintiff was Norman Hesson. Mr. Hesson was hired by the Defendant in approximately 1988. He testified that he had never had an accident while employed with Defendant and had received three speeding tickets. He further testified that he received the last speeding ticket to the best of his memory sometime in October, 1989 and that he informed the terminal manager of this speeding ticket. He testified that he received a suspension of one (1) week because of this ticket. Mr. Hesson is also a member of the protected class in that he was 43 at the time of this trial. Mr. Hesson testified that he has never been caught driving company equipment recklessly and that the company took a very strict position on reckless driving. He also testified that two of his speeding tickets occurred prior to a policy

memorandum issued by the Defendant concerning three offenses for speeding within a twelve (12) month period. There was no testimony elicited from Mr. Hesson to establish that his three speeding tickets occurred within a twelve (12) month period.

A third witness, Mr. Paul Norman, testified on behalf of the Plaintiff. Mr. Norman had at the time of trial been employed by Defendant for about six (6) years. Mr. Norman was twenty-six (26) years old at the time of trial. Mr. Norman was assigned the City of Charleston route after the Plaintiff was terminated. During the time Mr. Norman was employed with Defendant, he had received one speeding ticket which he reported to the Defendant. No testimony was received from Mr. Norman to establish when he received the speeding ticket. Mr. Norman did not receive any kind of letter of suspension or other punishment as a result of this ticket. There was no testimony elicited from Mr. Norman concerning the company policy in effect at the time he received this ticket. Mr. Norman also testified that he had been involved in three accidents since being employed by Defendant and he received a warning letter on one of these accidents. All three accidents were described as "parking lot" incidents. Mr. Norman testified that he had never been caught or observed driving a company vehicle recklessly.

The fourth witness presented by the Plaintiff in an attempt to show disparity of treatment was Gary Breeden. At the time of trial, Mr. Breeden had been employed by Defendant for six years and one month. Mr. Breeden testified that he had received four speeding tickets since he had been employed by Defendant. Mr. Breeden testified that he was thirty-eight (38) years old at the time of trial. Mr. Breeden received a three day suspension for the last speeding ticket. Mr. Breeden testified that he had never had an accident in Defendant's vehicles that was chargeable. Only one of Mr. Breeden's speeding tickets was received after the April, 1989 speeding and tailgating policy statement. Mr. Breeden testified that he had never been caught or observed driving Defendant's vehicle recklessly.

The Defendant's terminal manager, Fred Terwilliger, also testified for the Plaintiff. Mr. Terwilliger testified that the decision to terminate the Plaintiff was made by the Defendant's safety department in Pittsburgh, Pennsylvania. Mr. Terwilliger testified that the Plaintiff was terminated for reckless operation. Mr. Terwilliger testified that two other individuals, Steve Nester and Dennis Wiblin, were terminated by the Defendant for reckless driving and both of those individuals were under the age of forty (40) and neither had suffered heart attacks.

REASONS FOR DENYING THE WRIT

The Plaintiff (Petitioner) alleged in the trial of this action that he was discriminated against because of his age and handicap by his employer (the Respondent). In order to establish a *prima facie* case for such employment discrimination the Plaintiff was required to establish at trial, by a preponderance of the evidence the following three elements:

1. He was a member of the protected class;

2. That the Defendant made an adverse decision concerning Plaintiff; and

3. That, but for Plaintiff's protected status, said adverse decision would not have been made.

Conoway v. Eastern Associated Coal Corp., 358 S.E. 2d 423 (W. Va. 1986); *State ex rel., Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.*, __ W. Va. __, 329 S.E. 2d 77 (1985).

The Petitioner states in his petition for writ of certiorari that the Defendant does not dispute that the Plaintiff met his burden as to the first two elements mentioned above. At the trial, the

Defendant did dispute one or more of these elements, however, the Defendant (Respondent) admits as it pertains to the motion for directed verdict, the first two elements of this *prima facie* test are not at issue.

As to the third element of his *prima facie* case at the trial of these matters, the Plaintiff did not offer any direct proof that but for his age and handicap he would not have been discharged. However, the West Virginia Supreme Court of Appeals in *Conoway v. Eastern Associated Coal Corp., supra,* at 429 has recognized that direct proof is seldom available in such cases and that evidence sufficient to create certain inferences will be acceptable in proving the third element. These inferences can be established by introducing evidence which would sufficiently link the Defendant's decision to terminate the Plaintiff and the Plaintiff's status as a member of the protected class. The court in *Conoway* observed:

> The evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

These elements, which the Plaintiff must prove by a preponderance of the evidence, go to the heart of an unlawful discrimination case. "The ultimate in the area of disparate disciplinary treatment has been found generally as follows: Whether members of a protected group were accorded different treatment than non-members engaged in similar activity." *State ex rel. Human Rights Commission v. Logan-Mingo Area Mental*

Health Agency, Inc., __ W. Va. __, 329 S.E. 2d 77, 85 (1985), *quoting Burdette v. F.M.C. Corp.*, 566 F. Supp. 808, 815 (N.D. W. Va. 1983).

Therefore, in order to establish the third element of his *prima facie* case, the Plaintiff must have introduced evidence of this disparity in treatment. It is this disparity in treatment that creates the inference that but for the Plaintiff's protected status he would not have been fired. The Plaintiff seems to skip by this issue in his petition for writ of certiorari but this issue is the crux of this case and the very issue addressed by the District Court in its memorandum order granted Defendant's motion for directed verdict. The Plaintiff spends a considerable amount of time in its petition discussing the shifting of burden once a *prima facie* case has been established. The Plaintiff goes on to argue that the District Court engaged in impermissible weighing of the facts in deciding that the Defendant's legitimate business reasons for the Plaintiff's termination of employment was more credible than the Plaintiff's evidence showing mere pretext. The Plaintiff clearly misses the mark in this analysis. This has nothing to do with this case or the District Court's ruling in its December 26, 1991 memorandum order. The issue of Defendant's legitimate business interest contrasted to Plaintiff's assertion of mere pretext never comes up in employment discrimination analysis until a *prima facie* case has been established.

> In an action to redress unlawful discriminatory practices in employment and access to place[s] of public accommodations under the West Virginia Human Rights Act, as amended, W. Va. Code 5-11-1, et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination .... *If the complainant is successful in creating this rebuttal*

> *presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and non-discriminatory reason for the rejections.* Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext in the unlawful discrimination.

Shepardstown V.F.D. v. W. Va. Human Rights Commission, __ W. Va. __, 309 S.E. 2d 341 (1983) (emphasis added).

The District Court never got to the second part analysis of weighing the legitimate business reason and the mere pretext arguments because it ruled that the Plaintiff had failed in its attempt to provide any evidence to prove that but for the Plaintiff's protected class status he would not have been terminated. The Plaintiff attempted to provide this inference by presenting testimony allegedly to show members of the non-protected class received more favorable treatment. The District Court found that the Plaintiff failed in this endeavor. Therefore, the analysis in evaluating the petition for writ of certiorari should be whether the District Court was clearly wrong when ruling the Plaintiff had not met its *prima facie* evidentiary burden in establishing the inference that but for Plaintiff's protected status he would not have been terminated. *Brown v. Reardon*, 770 F.2d 896 (10th Cir. 1985). More specifically, did the Plaintiff present sufficient evidence to prove unequal or disparity of treatment between non-members of the protected class and the Plaintiff. Clearly, the evaluation of the sufficiency of the evidence is not a question for this Court and does not come close to meeting the standards enumerated in Rule 10 of the United States Supreme Court Rules.

The case of *Lovelace v. Sherwin William Co.*, 681 F.2d 230 (4th Cir. 1982), presents the standard upon which it is decided whether the Plaintiff has presented enough evidence as to said inference to survive a motion for directed verdict. The court held that "reasonable probability" is the proper test in determining the sufficiency of circumstantial evidence in a case such as this by stating:

> This emphasis, whether causation is dispositive, upon . . . "reasonable probability" . . . rather than mere "possibility" as the proper test simply bespeaks that special danger that in a matter so generally incapable of certain proof jury decision will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere "possibilities: by impermissible but understandable resort to such factors as sympathy and the like. It is, or course, precisely to guard against this danger that the burden of producing rationally probative evidence . . . and the corresponding risk of non-production . . . is placed upon the claimants and subjected to the ultimate jury control devices of directed verdict and judgment n.o.v.

681 F.2d at 242, *citing Brady v. Southern Railway Co.*, 320 U.S. 476, 480 (1940); *Galloway v. United States*, 319 U.S. 372, 395 (1942).

In the case at hand, not only was there an absence of sufficient evidence to make the inference that the Plaintiff would not have been discharged but for his protected status reasonably probable, there was *no* such evidence tendered. The Plaintiff presented no evidence to establish that other employees of the Defendant who

were not members of the protected class were not disciplined, or where disciplined less severely, than the Plaintiff, though both engaged in similar conduct. If there is a complete absence of probative facts to support particular inferences, or if facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonableness could not arrive at but one verdict, the court may bypass the jury. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, *rehearing denied*, 577 F.2d 1134, *appeal after remand*, 644 F.2d 534.

All four of the Plaintiff's witnesses presented to show alleged disparity of treatment testified that they had never been caught or observed operating Defendant's equipment recklessly. This is precisely the conduct for which Plaintiff was discharged. The Plaintiff simply produced no evidence of similar conduct by the witnesses she presented. In contrast, Fred Terwilliger testified that two other individuals who were not members of the suspect class were observed driving recklessly in company equipment and were discharged. The Plaintiff offered no evidence to dispute this. The Petitioner argues that this testimony lacked credibility. However, even if this is true, this does not diminish the fact that the Petitioner presented no affirmative evidence of disparate treatment. The Plaintiff offered no evidence of any other individual who was not a member of the suspect class who was observed driving recklessly in Defendant's equipment but was not fired. The Plaintiff simply has not met its burden in this regard.

The Plaintiff attempts to make his case on the assertion that the four witnesses presented were engaged in similar conduct by virtue of having been involved in accidents and having received speeding tickets with a corresponding failure by Defendant to abide by its written policy applicable thereto. First of all, these incidents are simply not similar conduct. The culpability of the Plaintiff and the severity of the reckless driving obviously makes it potentially damaging to Defendant and dissimilar to a routine speeding ticket or unintentional accident.

The Petitioner adds a new creative twist to his argument by arguing that West Virginia state regulations setting forth West Virginia's numerical point system for penalties for driving/traffic violations should be utilized to establish "same or similar conduct" in a federal discrimination case. However, the Petitioner cites no authority for this proposition, because there is none.

Secondly, the Plaintiff presented no evidence to show that the four employees of Defendant were treated less severely than the appropriate company policy. Richard Norman stated that he had one speeding ticket while employed by Defendant and he did not report the same to the Defendant. The one accident that he was involved in that he was at fault he received a one day suspension and Plaintiff failed to introduce any evidence that this was contrary to established company policy.

Norman Hesson testified that he had only received one speeding ticket after the April 1989 policy on speeding and tailgating and that he received a one week suspension for the same which was more severe than called for in the applicable policy.

It is interesting to note that the above two witnesses are themselves members of a protected class in that they each are over forty years of age. It is the Defendant's position that these two witnesses do not meet the evidentiary requirement of being non-members of a protected class.

Paul Norman testified that he received one speeding ticket but did not testify when the ticket was received or if his punishment or lack thereof was contrary to established company policy. The testimony of Gary Breeden also did not establish that he had been treated more favorably than company policy. He testified that he had received four speeding tickets, no two of which were shown to have occurred in any one twelve month period. Only the last of Breeden's tickets came after the issuance of the company's April,

1989 policy pertaining to speeding and tailgating and the evidence showed that Breeden actually received punishment greater than prescribed for first offense violations under the Defendant's speeding and tailgating policy.

The Plaintiff simply did not present any evidence that other employees of Defendant which were not members of a protected class were treated more favorably for similar conduct than Plaintiff nor did he present evidence that Defendant violated its own policies in its treatment of employees who were not members of a protected class.

Finally, the Plaintiff argues in its brief that the court erred in not allowing the introduction of a memorandum dated October 30, 1989. The court ruled that the document was irrelevant. The Plaintiff argues that this document has relevance in proving pretext. However, if so, it certainly was harmless error. As stated before, the district court ruled that the Plaintiff did not meet his evidentiary burden in establishing a *prima facie* case for employment discrimination. Pretext only comes into the analysis after the burden has been met. Therefore, this element is clearly irrelevant to the discussion of the appropriateness of the District Court's ruling.

CONCLUSION

For the above stated reasons, it is clear that Plaintiff did not present a *prima facie* case of age or handicap employment discrimination. The Plaintiff failed to introduce any direct evidence or circumstantial evidence that would lead to the inference that but for his age and handicap he would not have been discharged. Therefore, the third element of the Plaintiff's case has not been established even when looking at all the evidence in a light most favorable to the Plaintiff. The Plaintiff (Petitioner) has certainly not shown that the District Court's decision was clearly wrong.

Also, the Plaintiff has not shown how the October 10, 1989 memorandum that the District Court ruled irrelevant is relevant to this action.

Finally and most importantly, the Petitioner simply does not present a unique or unsettled issue that would fit within the criteria established by Rule 10 of the United States Supreme Court Rules.

Based upon all of the foregoing authorities and argument, Danny Lee Hill's petition for writ of certiorari should be denied.

Respectfully submitted,

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